82-1864

No. _____

IN THE

Supreme Court of the United States

OCTOBER 1, 1982 TERM

131.68 ACRES OF LAND, MORE OR LESS SITUATED IN ST. JAMES PARISH, STATE OF LOUISIANA AND PAUL NELSON FALGOUST ESTATE, ET ALS, AND 4.52 ACRES OF LAND, MORE OR LESS SITUATED IN ST. JAMES PARISH, STATE OF LOUISIANA AND PAUL NELSON FALGOUST ESTATE, ET ALS

Petitioners

VERSUS

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORIGINAL APPLICATION FOR WRIT OF CERTIORARI
ON BEHALF OF PAUL NELSON FALGOUST
ESTATE, ET ALS AND HERMAN J. FALGOUST,
PRESTON L. FALGOUST AND ROGER ROUSSEAU

JOHN L. PEYTAVIN
LLOYD R. HIMEL
ANTHONY J. NOBILE
MARTIN, HIMEL, PEYTAVIN & NOBILE
POST OFFICE BOX 278
LUTCHER, LOUISIANA 70071
TELEPHONE (504) 869-5678

QUESTIONS PRESENTED FOR REVIEW

I.

Are front-lands versus back-lands characteristics "issues of fact" as decided by the Fifth Circuit or "issues of law" as supported by the weight of national authority?

II.

Whether there exists a conflict between the present decision and other holdings of the Fifth Circuit on "the unity or separateness of tracts as a question of fact" and "the exclusive use of before and after method of valuation" and long standing decisions in the Fourth and Ninth Circuits, such as *United States v. 97.19 Acres of Land, More or Less, Etc.*, 582 F.2d 878 (4th Cir. 1978) and *Cole Investment Co. v. United States*, 258 F.2d 203 (9th Cir. 1958)? Commenting on the conflict, the Court in *United States v. Easements Upon 104.09 Acres, Etc.*, 442 F.Supp. 926 at 928 (D.C.E.D. Wash 1977) stated the majority and better rule to be that where the tract is used for separate purposes "the Court must view the tracts as separate in law."

III.

Were the Falgoust Cropowners deprived of just compensation by the clearly erroneous application of ANNUAL crop damage principles to the Cropowners' PERENNIAL crop losses?

IV.

Applying state law, should the Lessees' unharvested sugar cane crop be classified as an immovable subject to the Fifth

Circuit's mandatory "undivided fee rule" or a movable in keeping with specific articles of the Louisiana Civil Code?

V.

Whether there exists a conflict between the Court of Appeals for the Fifth Circuit and the Court of Appeals for the First Circuit as a result of the decision in this case and the decision rendered by the First Circuit Court of Appeals in *W. H. Elliot and Sons Co., Inc. v. E. F. King, Incorporated, et al*, 291 F.2d 79 (1st Cir. 1961)? The First Circuit held that for rose plants with a normal four year rotation, to the extent that damaged plants were not replaced, there was a loss of profits due to worthless and inferior production.

VI.

Whether applicant Landowners and Cropowners were constitutionally entitled to due process hearings, before being dispossessed of their properties?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1) This case involves the Fifth Amendment to the Constitution of the United States, particularly the Due Process and Just Compensation clauses, which provide as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation".

2) This case also involves Article 474 Movables by Anticipation, which provides as follows:

> "Unharvested crops and ungathered fruits of trees are movables by anticipation when they belong to a person other than the landowner. When encumbered with security rights of third persons, they are movables by anticipation insofar as the creditor is concerned.
>
> The landowner may, by act translative of ownership or by pledge, mobilize by anticipation unharvested crops and ungathered fruits of trees that belong to him." See Louisiana Civil Code, Article 474.

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SUPREME COURT OF THE UNITED STATES

TERM, 1983

UNITED STATES OF AMERICA
Plaintiff-Respondent

VERSUS

131.68 ACRES OF LAND, MORE OR LESS
SITUATED IN ST. JAMES PARISH,
STATE OF LOUISIANA, AND PAUL
NELSON FALGOUST ESTATE, ET ALS
Defendants-Applicants

CONSOLIDATED WITH

UNITED STATES OF AMERICA
Plaintiff-Respondent

VERSUS

4.52 ACRES OF LAND, MORE OR LESS,
SITUATED IN ST. JAMES PARISH,
STATE OF LOUISIANA, AND PAUL
NELSON FALGOUST ESTATE, ET ALS

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

**ORIGINAL APPLICATION
FOR WRIT OF CERTIORARI
ON BEHALF OF PAUL NELSON FALGOUST
ESTATE, ET ALS, AND HERMAN J. FALGOUST
PRESTON L. FALGOUST AND ROGER ROUSSEAU**

LIST OF PARTIES TO THIS PROCEEDING:

1) A. OWNERSHIP OF THE LAND

ESTATE OF PAUL NELSON FALGOUST
HUSBAND OF/AND GERTRUDE T.
FALGOUST 50%

PAUL N. FALGOUST
TRUST (CHILDREN) 35%

FALGOUST EDUCATIONAL TRUST 15%

B. OWNERSHIP OF THE CROPS

HERMAN J. FALGOUST, PRESTON L.
FALGOUST AND ROGER J. ROUSSEAU
(LESSEES)

2) UNITED STATES OF AMERICA

**STATEMENT OF THE GROUNDS ON WHICH THE
JURISDICTION OF THE SUPREME COURT OF
THE UNITED STATES IS INVOKED**

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 2101 and related Constitutional

and statutory authorities. This application for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit seeks to reverse the judgment of the Court of Appeals dated January 17, 1983. The Court of Appeals denied the petition for rehearing on February 14, 1983, which was transmitted to the Clerk of the District Court on February 24, 1983.

STATEMENT OF THE CASE

This action was filed by the government in May of 1978 to acquire land for Strategic Petroleum Reserve tank farm and pipeline facilities. It condemned front land adjacent to the Capline System owned by a consortium of oil companies and near Mississippi River dock facilities.

The 586 acre Falgoust tract was devoted to two separate uses at the time of the taking. Its front lands were leased to Shell Pipeline Corporation, Exxon Pipeline Corporation and Cities Service Oil Company for industrial purposes primarily supportive of the Capline Terminal.

Its rear lands, and other portions not yet leased to industry, were subject to a voidable agricultural lease reflecting a lesser present use. The portion taken was bracketed on three sides by Cities Service and Exxon Leases and the Capline Terminal fee ownership. Shortly thereafter a Falgoust Landowner lease to LOCAP closed the rectangle.

The District Court followed the mandatory Fifth Circuit rule which requires the exclusive use of the before-and-after method of valuation. Its use in the present case deprived the Landowners of $66,590.00 in just compensation prescribed by the Fifth Amendment. Inclusion, in an overall evaluation,

of less attractive rear lands in agricultural use, substantially diluted the unique value of prime front lands clearly industrial in character.

The Fifth Circuit refused to review the District Court's exclusive use of the before-and-after valuation of the entire 586 acre tract. It concluded instead that issues raised were "questions of fact" and not "questions of law".

The Cropowners' testimony established that one planting of plant cane in practice yielded an average of three harvests without replanting. Because of this fact they had set up bookkeeping entries allocating one-third (1/3) of their September, 1977 planting costs to future harvest years for crops maturing in 1978, 1979 and 1980.

The District Court at page 9 and the Fifth Circuit at page 1905 accepted the fact of the three year cycles. The judgments, however, awarded just compensation for only the 1978 sugar cane harvest year. Although the cropowners Lessees did not own the land, both Courts equated Landowners with Cropowners and reasoned that the amounts the Landowners received for their land included lost opportunities to earn profits from the land after the taking.

On the one hand the Fifth Circuit concluded that an award of Lessee net profits after 1978 would result in "double compensation" or "two years profits from government land". On the other hand it concluded that the Lessees were entitled to 1979 and 1980 compensation but that the District Court paid them by reversing their own bookkeeping entries allocating one-third (1/3) of Cropowner incurred costs from 1979 and 1980 back to 1978.

The Fifth Circuit concluded that growing crops are property under Louisiana law. In so doing it recognized that state law governs in defining the existence of a property interest for which compensation must be paid. It did not, however, define the property interest in this case. It did not recognize Louisiana law, as defining lessees' property interest in unharvested crops as movables and not component parts of the land.

The Fifth Circuit decided the issue of a right to a hearing on the "just compensation" rather than the "due process and just compensation" clauses of the Fifth Amendment. It bypassed the question of whether 42 U.S.C. Section 6239(g) was hortatory or mandatory.

ARGUMENT

MAY IT PLEASE THE COURT:

I. EXCLUSIVE USE OF THE BEFORE-AND-AFTER METHOD OF VALUATION BY THE FIFTH CIRCUIT

In footnote 5 on page 392 in the case of *United States v. 8.41 Acres of Land, More or Less, Situated in Orange County, State of Texas, et als*, 680 F.2d 388 (5th Cir. 1982) the Fifth Circuit made the following unqualified observation:

> "The applicable federal law in the Fifth Circuit, however, requires the exclusive use of the before-and-after method of valuation."

According to the footnote listed above, 4A Nichols, The Law of Eminent Domain Sect. 14.31 (rev. 3d ed 1981)

notes at least two methods by which just compensation in partial taking cases can be ascertained:

> "The before-and-after method of valuation," and "The value of the actual land taken plus the diminution of the value of the remaining land in the parent tract."

Obviously the correct computation of severance damages plays a role in selection of a valuation method. When, as here, severance damage is not at issue, there appears to be no logical reason for the exclusive use of one method over the other. The detrimental effect to the Landowner is the dillution of his "just compensation".

II. THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH THE COURT OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

The opinion of the Fifth Circuit in this case follows its dogmatic pronouncement in the Orange County Texas case cited above. It clings tenaciously to the exclusive use of the before-and-after method.

In *United States v. Easements Upon 104.09 Acres of Land, More or Less, Etc.*, 442 F.Supp. 926 at 928 the District Court stated the majority rule to be:

> "It is a well established rule that in determining the market value of a piece of real property . . . the Court must look not only to the present use of the property, but also to the highest and best use to which the land is reasonably suited."

It criticized the Fifth and Seventh Circuit approaches in the following words:

> "The Court believes that both the Fifth and Seventh Circuit decisions are based on an unfortunate mingling of existing legal principles."

It concluded at page 928, with the following comparison:

> "The Court believes that the majority and better rule is that where a tract is being used for separate purposes, even though it could be most advantageously used for a single purpose, the Court must view the tracts as separate in law."

In the instant case, if the inflexible Fifth Circuit rule is relaxed, appraisers for both the Applicant and the Respondent (Epplington and Derbes), agree that additional compensation is due the Landowners.

III. THE APPLICANT CROPOWNERS WERE DEPRIVED OF ADDITIONAL COMPENSATION BY THE ERRONEOUS APPLICATION OF ANNUAL CROP PRINCIPLES TO PERENNIAL CROP LOSSES

At page 1905 of its opinion the Fifth Circuit recognized that sugar cane has an unusual growing cycle extending over four calendar and three harvest years. It then proceeded to award crop damages for 1978 only as though sugar cane was ANNUAL having only one harvest season.

It erroneously applied ANNUAL crop principles set forth in three cited cases to Applicant's sugar cane crop losses suffered over three harvest seasons:

1) *King v. United States*, 504 F.2d 1138, (Ct.Cl. 1974) was particularly inappropriate to apply. The crops, presumably annual, were never identified. Kansas law on growing crops is exactly opposite from Louisiana. At page 1142, the Court indicated that in Kansas "growing crops are considered part of the realty." Article 474 of the Louisiana Civil Code makes unharvested crops movables when (as here) they belong to a person other than the land owner.

2) *United States v. Buhler*, 305 F.2d 319, 331 (5th Cir. 1962) was a case where the land taken was valued at $30,000.00 and severance damages at $145,000.00. The quoted language referred to a remand to apportion awards between landowners and their rice tenants. This would only be necessary if unharvested crops form part of the realty. Obviously in Texas (unlike Louisiana) they do. An additional distinction lies in the fact that rice has an ANNUAL and not a PERENNIAL life cycle.

3) *Daily v. United States*, 90 F.Supp. 669 (Ct.Cl. 1950) was a Court of Claims case that applied California law defining property interests for destruction of a grey banana squash crop. Banana squash are ANNUALS. By stipulation of the parties the Court of Claims and not the District Court condemnation suit considered damages for the banana squash crop.

Both the District Court and the Appellate Court concurred in the government expert's error that an assumption that all acreage was plant cane was an assumption "favorable to the lessees." His yield figures were based on actual production from the remainder of the tract. They reflected what was actually left in the ground – plant cane, first year stubble and second year stubble in actual proportions.

The District Court fell into additional error by concluding that "compensating the defendants as if they had lost three years sugar cane would impermissibly compensate them for future profits" because the government had already paid market value for the land. This conclusion confuses ANNUAL CROPS with PERENNIAL CROPS and confuses the lessees with the landowners.

The only reason why a cropowner is usually limited to one year's crop damage is that most crops are ANNUALS for which one year's profits equal just compensation. The different standard required for PERENNIALS is recognized at 20 POF 2d p. 125:

"Section 3. - Perennial Crop and Plants

The usual measure of damages for injury to or destruction of a growing crop may not accurately reflect the loss that is suffered when the defendant's wrongful act has resulted in the destruction of a perennial crop that is not quickly reestablished within the succeeding growing season. In this context a "Perennial" crop may be distinguished from an "ANNUAL" crop in that the perennial crop is produced from an existing plant or root system whose productive life ordinarily extends over a period of several years. Some major crops that are classified as perennials include alfalfa, many grasses, and fruit and nut-bearing trees and vines."

The above annotation cites the cost of reseeding as a necessary element of damage. At 20 POF 2d p. 127 Section 3 it focuses on the exact problem encountered in the instant case:

> "It should be noted that in seeking recovery for damages measured by the value of a growing

> perennial crop plus diminution in land value, the plaintiff cannot ordinarily recover from crop losses in growing seasons subsequent to the season in which the injury occurred. Instead his recovery is limited to the value of the specific crop that was injured; the loss of future crops would be reflected in the diminution in the value of the land. Comment: One court has observed that this may be a proper measure of landowner damages, but it does not provide adequate compensation where the plaintiff is the lessee of the injured land. A plaintiff-lessee cannot recover for any injury to the land itself, except insofar as the injury may have affected the value of the use of the land for the term for which he leased it. Thus in an action to recover for long-term injury for a stand of alfalfa the court held that the plaintiff-lessee's recovery could be measured by the net loss in crop yield during the years covered by the lease" (Emphasis Supplied). Citing *Binder v. Perkins*, 213 Kan. 365, 516 P.2d 1012.

Research of state and federal cases indicates that the "perennial" compensation principle has been applied or recognized in cases involving sugar cane in Louisiana, *Humble Pipe Line Company v. Wm. T. Burton Industries*, 253 La. 166, 217 So.2d 188 (1968); alfalfa in Kansas, *Binder v. Perkins*, above; cherries in Washington, *Penney Farms, Inc. v. Heffron*, 24 Wash.App. 150, 599 p. 2d 536 (1979); apples in New Hampshire, *Edwood v. Bolet*, 403 A.2d 869, (1979) and roses in New Hampshire in the only federal case to consider the subject, *W. H. Elliott and Sons Co., Inc. v. E. F. King and Co., Inc., et als*, (1st Cir. 1961) 291 F.2d 79.

IV. CROPOWNER LESSEES' UNHARVESTED SUGAR CANE CROP SHOULD BE CLASSIFIED AS MOVABLE AS DEFINED BY THE LOUISIANA CIVIL CODE AND NOT AS PART OF THE REALTY SUBJECT TO THE FIFTH CIRCUIT'S MANDATORY UNDIVIDED FEE RULE

The root of the Fifth Circuit's difficulty on this point was its unwillingness to classify applicant Cropowner's sugar cane crop as a movable. At page 1906 it would only say that "growing crops are property under Louisiana law". This stops one word short of a classification for the following reason:

> "Louisiana Civil Code Article 474 Movables by Anticipation,
>
> Unharvested crops and ungathered fruits of trees are movables by anticipation when they belong to a person other than the landowner. When encumbered by security rights of third persons, they are movables by anticipation insofar as the creditor is concerned."

The District Court in its conclusions of law correctly concluded that "Louisiana law governs in defining the existence of a property interest for which compensation must be paid. 12 Wright and Miller Federal Practice and Procedure, Section 3042 at 94." Louisiana law defines the property interest in applicants' sugar cane crop as a movable. This is contrary to general federal law. See *Barnes v. United States*, 538 F.2d 865 at 874 (Ct. Cl. 1976): "unsevered crops not ready for harvest as a general rule constitute a part of the realty." Since Louisiana law is opposite, the

principles of *King*, *Buhler* and *Daily* were improperly applied in this case.

Had the District and Appellate Courts properly defined the property interests involved, the following errors confusing Landowner compensation and Cropowner compensation would have been avoided:

Page 1906: "The Landowners received the difference in the market value of their tract of land before and after the taking. That sum included compensation for lost opportunities to earn profits from the land after the taking."

"Adding compensation for the loss of net profits after the date of the taking would have resulted in double compensation."

Page 1907 footnote 5. "No party below requested the district court to apportion the compensation between the landowners and the lessee."

These statements evidence the obvious error of valuing unharvested sugar cane as part of the realty and not as movables as defined by state law. These errors deprived the Cropowners of $165,862.00 in compensation, the difference between the $82,931.00 awarded and the three year estimate of $248,793.00 if the figures of the Respondent's expert are accepted.

Accepting Louisiana's definition of sugar cane as movable would not be unprecedented in existing federal expropriation law. There are at least two existing categories of property attached to real estate that are recognized in federal law as exceptions to the "unit" or "undivided fee rule":

1. Fixtures Constituting Real Property Belonging to Tenants which will Lose Value Upon Removal. See *United States v. Certain Property Located in Borough of Manhattan, Etc.*, (2nd Cir. 1965) 344 F.2d 142, 1 ALF Fed. 459, and cases cited therein;

2. Outdoor Advertising Signs Located on Property whose Highest and Best Use Is For Other than Outdoor Advertising. See *United States v. 40.00 Acres of Land, More or Less, Situated in Henry County, State of Missouri* (1976) 427 F. Supp. 434 and the cases cited therein.

If a tenant in Manhattan and an advertiser in Missouri can be paid separately for movables attached to realty, why not a sugar cane lessee in Louisiana?

V. THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT IN THE ONLY REPORTED FEDERAL CASE TO INSTRUCT ON A MULTIYEAR DAMAGE AWARD FOR PERENNIAL PLANT GROWTH.

The case of *W. H. Elliot and Sons Co., Inc. v. E. F. King, Incorporated, et als*, 291 F.2d 79 (1st Cir. 1961) involved chemical poisoning of commercial rose bushes normally replaced in four (4) year cycles. In ordering remand, the Court recognized the multi year aspect of PERENNIAL crop damage awards, in its instruction at page 82:

> ". . . there are two central, well-defined elements to be considered – the shortening of the useful lives of the individual plants and the diminution

> during their lives of their producing capacity, in quality and quantity. With respect to the latter, the measure of damages is the difference between the worth of what injured plants actually produced until replaced by new producers, and the worth of what they normally could have been expected to produce up to that time."

The instruction leaves no doubt that multiyear crop damages are to be paid in money. In contrast to this the Fifth Circuit paid for one year (1978) profits in cash, less one-third (1/3) of the planting costs (incurred in 1977 and allocated to 1978) plus two-thirds (2/3) of the planting costs (incurred in 1977 allocated to 1979 and 1980 and reallocated by the Court to 1978). The District Court accomplished this by reversing and reassigning the Cropowners' bookkeeping entries.

The incongruity of this innovation is that planting costs should logically be either subtracted or added. To subtract here and add there, unequal fractional parts of an original whole, ensures that at the final weigh-in the scales of just compensation will be out of balance on one side or the other.

Additionally, the just compensation clause of the Fifth Amendment was interpreted to mean payment in money. See *United States v. Miller*, 317 U.S. 369, 87 L.Ed. 6, 63 S.Ct. 276. Applicants submit that reversing planting cost allocation stops short of the Constitutional standard.

In the *Elliot* case above, the nurseryman was to receive multiyear profits for damaged rose bushes. In the instant case the farmer was limited to one year's profits and an

allocation of two-thirds (2/3) planting costs. For this reason applicants contend that the circuit decisions are in conflict.

The Fifth Circuit reasoned at pages 1906 and 1907 that just compensation profits for 1979 and 1980 would result in "double compensation" because of the "undivided fee rule". As pointed out earlier state law movables form no part of the real estate fee.

The Fifth Circuit opinion at page 1907 quotes *United States v. 576.734 Acres of Land, Etc.*, 531 F.Supp. 967, 974-975 (D.Haw. 1982), a case which held that an immature sugar cane crop was a movable because Hawaiian law made it so. That case separately compensated the lessee for his immature crop as of the date of the taking because in Hawaii . . . "forecasts of costs can be made with great accuracy." The perennial nature of the sugar cane crop was not raised in the Hawaiian case.

Finally, in the instant case, it should be noted that there was nothing speculative above three year profit estimates. The case was tried in February of 1981. At that time all factors: price, costs, and profits were fully known to all experts.

VI. THE APPLICANT LANDOWNERS AND CROPOWNERS WERE NOT GRANTED AN OPPORTUNITY TO BE HEARD ON THEIR DEFENSES BEFORE BEING DISPOSSESSED OF THEIR PROPERTIES

The Fifth Amendment of the United States contains the following provisions on deprivation of property:

> "No person shall . . . be deprived of . . . property, without due process of law; nor shall

> private property be taken for public use, without just compensation." Historically this meant notice, hearing and payment in money.

At page 1907 of the decision here, the Fifth Circuit indicates that in its post *Stringer* era the only remaining guarantee is eventual just compensation. It refers to *Stringer v. United States*, 471 F.2d 381, 383 (5th Cir.) *cert. den.*, 412 U.S. 943, 93 S.Ct. 2775, 37 L.Ed. 404 (1973).

In *Stringer*, the Superintendent of the Natchez Trace Parkway placed a barricade across the Stringers' fifteen foot easement under the authority of an Act of Congress: 16 U.S. C.A. 460. In upholding the Superintendent's actions the circuit court referred back to *Gardner v. Harris*, (5th Cir. 1968), 391 F.2d 885, where the same Superintendent barricaded off the Stringers' neighbor. The *Stringer* case did not explain how an Act of Congress can displace the due process (notice and hearing) requirements of the Fifth Amendment. A footnote merely informed that the Constitutionality of the statute was not challenged.

Applicants ask that the *Stringer* case which formed the basis for a denial of a hearing on their defenses be overruled. It should be noted that no motion to strike defenses was ever filed in the instant case.

Assuming, for the sake of argument, that an Act of Congress can displace the notice and hearing requirements of the Fifth Amendment, Applicants argue that neither 40 U.S.C. Section 258A nor 42 U.S.C. Sections 6201-6422 clearly do this. Rather, Section 6239(g) seems to require them. Applicants final request is that this Honorable Court grant certiorari and decide whether its provisions are hortatory or mandatory.

CONCLUSIONS

A Fifth Circuit rule requires the exclusive use of before-and-after evaluation in condemnation cases. This rule reduced the Landowners compensation by $66,590.00. It conflicts with the law of other circuits and should be set aside.

The erroneous application of ANNUAL crop principles to PERENNIAL crop losses cost the Cropowners $165,862.00. Louisiana law defines a lessees' unharvested crops as movables. Since Cropowner-lessees cannot recover for injury to the land, their damages are measurable by net loss of crop yield beyond the year of the taking. The one prior federal case on PERENNIAL plant losses is in conflict with this case.

The Applicants were entitled to and denied due process hearings on their defenses.

RESPECTFULLY SUBMITTED,

MARTIN, HIMEL, PEYTAVIN & NOBILE
POST OFFICE BOX 278
LUTCHER, LOUISIANA 70071

BY: John L. Peytavin per RPS
JOHN L. PEYTAVIN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Application for Writ of Certiorari has been served on opposing counsel of record by depositing the same in the United States Mail postage pre-paid, properly addressed as follows:

Hon. John Volz
United States Attorney
United States of America
500 Camp Street
New Orleans, Louisiana 70130

Hon. Martin W. Matzen
Attorney General's Office
Land and Resources Division
Washington, D.C. 20530

Hon. Jacques B. Gelin
Assistant United States Attorney
Department of Justice
Washington, D.C. 20530

Honorable Judges of the
United States Court of Appeals
For the Fifth Circuit
c/o Hon. Gilbert F. Ganucheau
Clerk of Court
United States Court of Appeals
For the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Lutcher, Louisiana, this 15th day of May, 1983.

John L. Peytavin per P.B.
JOHN L. PEYTAVIN

MINUTE ENTRY
SEAR, J.
February 10, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA VERSUS 131.68 ACRES OF LAND, ETC., ET AL	CIVIL ACTION NO. 78-1439 SECTION "G"
UNITED STATES OF AMERICA VERSUS 4.52 ACRES OF LAND, ETC., ET AL	CIVIL ACTION NO. 79-2984 SECTION "G"

These consolidated cases came on for trial by the court without a jury on February 2, 3 and 4, 1981. Having considered the testimony of the witnesses, the evidence submitted at trial and the memoranda of counsel, I now make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On May 5, 1978, the United States of America filed a Complaint in Condemnation for the taking of property consisting of 131.68 acres of land under the power of eminent domain together with a Declaration of Taking dated April 22, 1978, and caused to be deposited into the registry of the Court the sum of Five Hundred Eighty-Eight Thousand Five Hundred Twenty-Seven ($588,527.00) Dollars, the estimated just compensation for the estate taken. On May 5, 1978, the Honorable Charles Schwartz, Jr., United States

District Judge for the Eastern District of Louisiana, granted the United States possession of the property.

2. On July 30, 1979, the United States of America filed another Complaint in Condemnation for the taking of an additional 4.52 acres of land under the power of eminent domain. At that time, a Declaration of Taking dated June 29, 1979, was also filed. On July 31, 1979, the Honorable Morey L. Sear, United States District Judge for the Eastern District of Louisiana, granted the United States possession of the property condemned. On July 31, 1979, the United States caused to be deposited into the registry of the Court the sum of Sixteen Thousand Four Hundred Sixty ($16,460.00) Dollars, the estimated just compensation for the additional estate taken.

3. Pursuant to the Declaration of Taking, the United States has acquired the following interests: 1) Tract No. 200-2, consisting of 104.76 acres in fee; 2) Tract No. 200E-1, consisting of 1.33 acres in perpetual easement; 3) Tract No. 200E-2, consisting of 0.67 acres in temporary easement; 4) Tract No. 200E-3, consisting of 2.36 acres in perpetual road access easement; 5) Tract No. 200E-4, consisting of 2.61 acres in perpetual easement; 6) Tract No. 200E-5, consisting of 0.65 acres in temporary easement; 7) Tract No. 200E-6, consisting of 1.32 acres in temporary easement (which is overlapped by Tract No. 200E-12); 8) Tract No. 200E-7, consisting of 0.56 acres in temporary easement; 9) Tract No. 200E-8, consisting of 0.27 acres in perpetual easement; 10) Tract No. 200E-9, consisting of 0.25 acres in temporary easement; 11) Tract No. 200E-11, consisting of 0.76 acres in perpetual road access easement; 12) Tract No. 200E-12, consisting of 1.88 acres in perpetual easement; 13) Tract No. 200E-13, consisting of 1.88 acres in temporary

easement; 14) Tract No. 212E-1, consisting of 6.25 acres in temporary easement; and 16) Tract No. 212E-4, consisting of 2.46 acres in temporary easement.

4. By stipulation executed on February 3, 1981, the parties agreed to the revestment of title in defendants to Tracts No. 200E-8 and 200E-9 in their entirety and 1.47 acres of the 2.36 acres of Tract No. 200E-3.

5. The interests acquired by the United States in these tracts have been taken for the construction and use of an oil storage facility maintained by the Department of Energy pursuant to the Strategic Petroleum Reserve Program mandated by Congress through the enactment of Public Law 94-163, the Energy Policy and Conservation Act of December 22, 1975.

6. The property from which the foregoing tracts were taken (the Paul Nelson Falgoust property) prior to the takings, consisted of approximately 586 acres of land fronting on the west descending bank of the Mississippi River at approximately 159.2 miles above the Head of Passes, or approximately 64 miles upriver from New Orleans.

7. At the time of the taking, the Paul Nelson Falgoust property was owned in indivision by defendants Paul Nelson Falgoust and his wife Mrs. Gertrude T. Falgoust, the Paul Falgoust Trust and the Falgoust Educational Trust and was under an agricultural lease to the defendants Herman J. Falgoust, Preston L. Falgoust and Roger J. Rousseau.

8. The Paul Nelson Falgoust property has approximately 1600 feet of river frontage and a depth of approximately 16,000 feet. Louisiana State Highway 18 (the "River Road")

crosses the tract at its landside eastern limit, and the Missouri Pacific Railroad crosses the property near the 40 arpent line.

9. At the time of the taking the property west of the River Road, excluding the area used for residential purposes, was under an agricultural lease, and industrial leases to Exxon Pipe Line Corporation and Cities Services Oil Company. The batture or river front of the property was under lease to Shell Pipeline Corporation for installation and operation of a tanker dock.

10. The Paul Nelson Falgoust tract is located on the Mississippi River between New Orleans and Baton Rouge in what is commonly known as the New Orleans-Baton Rouge Industrial Corridor. The property is located along the Cantrelle Reach, which is the longest straight reach of the Mississippi River below Baton Rouge, extending approximately five miles. The reach has deep water, stable banks, good batture depth, and is navigable from low water line to low water line.

11. The Paul Nelson Falgoust property is a prime site because of its strategic and unique location. The tract abuts the Capline System, an important pipeline common carrier owned by a consortium of oil companies with an extensive capacity for transporting crude oil to refineries in the North and Midwest, and is a central terminus for other pipeline activity. The Paul Nelson Falgoust property is one of only three possible industrial sites which adjoin or abut the Capline System property. This proximity to the Capline facility makes the Paul Nelson Falgoust property a uniquely valuable tract among the sites located along the Mississippi River.

12. Industries buying parcels of land on the Mississippi River typically purchase the entire depth of ownership back

to the 80-arpent line for two reasons. First, the industry may require the entire depth of the property for immediate site development or future expansion. Second, prudent sellers would not ordinarily sell only the front portion of a tract because the rear property further away from the river has a greatly diminished value.

13. The highest and best use for the Paul Nelson Falgoust tract before the taking, and after the taking as well, is for deep water industrial development. The attributes for such development, both before and after the taking, include river frontage, size, railroad access, and proximity to pipelines and the Capline facility.

14. There are at least two methods for computing just compensation that are potentially applicable to these cases. The first is the market data approach, by which one computes just compensation by taking the difference between the value of the entire tract before the taking and the value of the remainder after the taking. The second is the capitalization approach, by which a calculation of the market value of the land actually taken is computed by capitalizing projected income and adding to this the severance damage caused by the taking. The most appropriate method for use in this proceeding is the market data approach, in which evidence of similar sales in the vicinity of the subject property made at or about the same time as the taking are used as the basis for the valuation.

15. I give no weight to the testimony of one of defendants' expert appraisers, Kermit Williams. His appraisal was based upon sales of property which I find were not comparable to the subject property in size, shape, overall use, or location. Mr. Williams based his appraisal on small, key

pieces of larger tracts that were a great distance from the subject property. His appraisal was at such variance with the appraisals of the other two experts who testified at the trial as to be unreasonable.

16. The government's expert appraiser, Max Derbes, Jr., primarily relied upon five sales he considered to be comparable, while the defendant's other expert appraiser, Irvington Eppling, relied primarily on three comparable sales. Of these sales, the only two that I find to be truly comparable are those designated "St. James 6," which was relied upon by Derbes alone, and "St. James 20," which was used by Derbes and Eppling. While I generally agree with the appraisal approach taken by Derbes, I do not agree with certain of his adjustments which were not justified by the evidence or the testimony elicited at trial.

17. In the sale designated "St. James 6," Derbes adjusted upward for the subject property's proximity to the Capline facility only 30 percent, or $900.00 per acre. In light of his own testimony and the testimony of Eppling, I find that Derbes' adjustment does not adequately reflect the unique value of the Falgoust tract's location near the Capline, and I conclude that the proper upward adjustment is 40 percent, or $1,320.00 per acre. Derbes also adjusted upward $500.00 per acre for the subject property's batture. I find, however, that this adjustment fails to account for the full value of the batture in light of the development of a deep water dock facility. I therefore conclude that the proper upward adjustment for the batture is $750.00 per acre. Finally, Derbes made no adjustment to reflect the value of the leases existing on the subject property. I find that Derbes' value figures must be adjusted upward an additional $100.00 per acre to reflect the value of these leases. Taking these changes into

consideration, along with the unchanged adjustments made by Derbes, and applying them to Derbes' basic opinions and methodology, the value indicated for the subject property is $2,500.00 (the price per acre of the St. James 6 tract at the time of its sale), plus $800.00 (Derbes' time adjustment), plus $1,320.00 (for the Falgoust tract's proximity to Capline), plus $750.00 (for the improved batture of the subject property), plus $100.00 (representing the value of the leases), or a total indicated value of the subject property of $5,470.00 per acre.

18. In the sale designated "St. James 20," Derbes again adjusted upward for the subject property's proximity to Capline only 30 percent, or $1,298.00 per acre. I find that the appropriate upward adjustment to reflect the unique value of the Falgoust tract near Capline is 40 percent, or $1,730.00 per acre. I also find that Derbes' value figures again must be adjusted upward $100.00 per acre to reflect the value of the leases existing on the subject property. Taking these changes into consideration, along with the unchanged adjustments made by Derbes, and applying them to Derbes' basic opinions and methodology, the value indicated for the subject property is $3,735.00 (the price per acre of the St. James 20 tract at the time of its sale), plus $590.00 (Derbes' time adjustment), plus $1,730.00 (for the Falgoust tract's proximity to Capline), plus $100.00 per acre (representing the value of the leases), minus $432.00 (Derbes' downward adjustment for shape and frontage to area ratio), or a total indicated value of the subject property of $5,723.00.

19. I conclude that the sales designated "St. James 6" and "St. James 20" are the best comparable sales to determine a before and after value for the subject property. The

average of the indicated value of the subject property obtained from these comparable sales is $5,596.50, rounded to $5,600 per acre. Multiplying this figure by the before-taking tract size of 586 acres, the total calculated by Eppling and claimed by the defendants, yields a before value for the property of $3,281,600.00. Applying the $5,600.00 per acre value I find is justified by the evidence of comparable sales to the calculations made by Derbes in the revised two-page summary of conclusions attached to his appraisal report, I find that the after value of the subject property is $2,613,926.00. Subtracting this after value from the before value of the subject property yields a just compensation for this taking of $667,674.00.

20. To this amount must be added $82,931.00 in damages as compensation for loss of sugar cane crops caused by the taking. The court accepts the testimony of the government's expert witness, Dr. Joe R. Campbell, on this issue. Defendants are not entitled, as they have argued, to three years' damages for loss of their sugar cane crop. While I find that the evidence shows that one planting of "plant cane" yields an average of three harvests, Dr. Campbell's calculation makes defendants whole for their crop losses attributable to the taking by charging one-third of the value of the planted cane as an expense of the sugar cane crop and giving defendants credit for the remaining two-thirds, which would be attributable to the future crops. In this way, defendants are fully compensated for their initial investment in plant cane. Moreover, I find that compensating the defendants as if they had lost three years of sugar cane crops would impermissibly compensate them for loss of future profits. Defendants no longer own the land on which the future crops would be cultivated; the present owner has paid for the land and the former owners have been made whole for their investment

and for the profits they would have reaped had not the crop that was growing at the time of the taking been destroyed by the taking. Thus, Dr. Campbell's one-year valuation of $82,931.00 properly makes defendants whole for the losses attributable to the taking.

21. In addition, the parties have stipulated to an amount due for mineral subordination of $1,048.00, which must be added to the amount of compensation due the defendants.

22. Adding the various elements listed above yields a total just compensation due the defendants as a result of the taking of $751,653.00, plus whatever interest is due from the date of the taking.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1358. Venue is proper according to 28 U.S.C. § 1403.

2. Louisiana law governs in defining the existence of a property interest for which compensation must be paid. 12 Wright & Miller, *Federal Practice and Procedure* § 3042, at 94. Otherwise, federal law governs all procedural and most substantive aspects of federal condemnation proceedings. Fed. R. Civ. Pro. 71A; *United States v. Miller*, 317 U.S. 369, 380, 63 S.Ct. 276, 283 (1943), as explained in *United States v. Cors*, 337 U.S. 325, 69 S.Ct. 1086 (1949).

3. Defendants are entitled to be paid just compensation for the condemnation of their property by the United States. U.S. Const. Amend. V; *United States v. Miller, supra*, 317 U.S. at 373, 63 S.Ct. at 279 (1943). Such compensation

includes the full and perfect equivalent in money or fair market value of the property taken plus the amount of severance damage for the land not taken. *Id.* at 373-77, 63 S.Ct. at 279-81. In effect defendants are entitled to be put in as good a position pecuniarily as if the property had not been taken. *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708 (1943).

5. "Fair market value" means the amount of money that a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adopted and might in reason be applied. *Transwestern Pipeline Company v. O'Brien*, 418 F.2d 15, 17 (5th Cir. 1969).

6. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. In this regard, highest and best use is that use for which the property is adaptable and needed or likely to be needed in the reasonably near future and which will induce the highest return from a willing buyer in the marketplace. *Olson v. United States, supra*, 292 U.S. at 255, 54 S.Ct. at 708-09.

7. The measure of damages where part of a tract of land is taken may be determined by at least two methods which are relevant to this case. First, the market value of the land actually taken may be added to the damages to the remainder area. *Sharp v. United States*, 191 U.S. 341, 352, 24 S.Ct. 114, 116 (1903); *United States v. Welch*, 217 U.S. 333, 30 S.Ct. 527 (1910); *United States v. Chicago, Burlington & Quincy R. Co.*, 82 F.2d 131, 134-45 (8th Cir.), *cert. denied*, 298 U.S. 689, 56 S.Ct. 957 (1936); *United States v. 97.19*

Acres etc., 582 F.2d 878, 880 (4th Cir. 1978). Second, under the "before and after rule," damages to the condemnee are computed as the difference between the value of the entire tract before the taking and the value of the remainder area after the taking. *Id.* The latter is the most appropriate method for use in this case.

8. When using comparable sales as a method of determining market value, generally the basis for valuation is evidence of similar sales in the vicinity made at or about the same time as the taking. *United States v. 1,129.75 Acres of Land, etc.*, 473 F.2d 996, 998 (8th Cir. 1973).

9. Sales subsequent to the taking are probative and admissible provided that they do not reflect artificially inflated values as the result of the condemnation itself. *Id.* at 998-99. *See also Jayson v. United States*, 294 F.2d 808 (5th Cir. 1961).

10. Use of the comparable sales method and the before and after value approach in this proceeding yields a compensation level of $667,674.00 for the land taken, to which must be added $82,931.00 for crop damages and $1,048.00 for mineral subordination. The total just compensation due the defendants is $751,653.00.

Let judgment be entered accordingly.

New Orleans, Louisiana, this 10 day of February, 1981.

/s/Morey L. Sear
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
SEAR, J.
March 6, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA VERSUS 131.68 ACRES OF LAND, ETC., ET AL	CIVIL ACTION NO. 78-1439 SECTION "G"
UNITED STATES OF AMERICA VERSUS 4.52 ACRES OF LAND, ETC., ET AL	CIVIL ACTION NO. 79-2894 SECTION "G"

Trial was held in the captioned consolidated cases on February 2, 3 and 4, 1981 in order to determine the just compensation due to the owners of the tract as a result of the government's taking. On February 10, 1981, I entered my findings of fact and conclusions of law ruling that just compensation for the land taken was in the total sum of $751,653.00. It appearing that an error was made in the computation of the after value of Tract No. 200E-3, and that the defendants are in fact entitled to an additional $4,984.00 as just compensation for the land acquired by the government,

IT IS ORDERED that my findings of fact and conclusions of law entered on February 10, 1981 are revised in the following manner:

Finding of Fact 19 is revised to provide that the after value of the subject property is $2,608,942.00 and the amount of

just compensation for the property taken is $672,658.00.

Finding of Fact 22 is revised so that the total just compensation due the defendants as a result of the taking reads $756,637.00, plus interest due from the date of the taking.

Conclusion of Law 10 is revised to provide that the just compensation due to the defendants for the land taken is $672,658.00, and the total just compensation due the defendants is $756,637.00.

Let judgment be entered accordingly.

New Orleans, Louisiana this 5 day of March, 1981.

/s/Morey L. Sear
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA versus 131.68 ACRES OF LAND, ETC., ET AL	CIVIL ACTION NO. 78-1439 SECTION "G"
UNITED STATES OF AMERICA versus 4.52 ACRES OF LAND, ETC., ET AL	CIVIL ACTION NO. 79-2984 SECTION "G"

FINAL JUDGMENT DETERMINING JUST COMPENSATION

Upon consideration of the record, the evidence adduced at the trial of these consolidated cases, the stipulation for revestment as to Tract Nos. 200E-3, 200E-8, and 200E-9, and the findings of fact and conclusions of law entered by this Court on February 10, 1981 and revised on March 5, 1981.

IT IS ORDERED that the estate as described in the Declarations of Taking in these consolidated cases is revised in accordance with the stipulation to revest signed and filed by the defendants and counsel for the United States on February 3, 1981, and that said revisions in the estate acquired by the United States of America are effective as of the date of taking in these consolidated cases, May 5, 1978, *nunc pro tunc*.

IT IS FURTHER ORDERED that judgment in the amount of $756,637.00 is entered in favor of the defendants as just compensation for all interests acquired by the United States

of America in the Declarations of Taking as revised herein, said sum consisting of $672,658.00 for the land acquired; $82,931.00 for crop damages; and $1,048.00 for mineral subordination.

IT IS FURTHER ORDERED that the United States of America shall deposit into the registry of the Court the difference between the amount of just compensation set out in the previous paragraph and the deposits already made in these consolidated cases, specifically $588,527.00 which was previously deposited in the registry of the Court in CA 78-1439, and $16,460.00 which was previously deposited in the registry of the Court in CA 79-2984. The United States shall also deposit an additional sum equivalent to the interest on the deficiency at the rate of six (6) percent per annum from the date of taking, May 5, 1978 pursuant to 40 U.S.C. § 258(a).

IT IS FURTHER ORDERED that upon deposit by the United States of the above specified amounts into the registry of the Court, the Clerk of Court shall pay to the defendants Paul Nelson Falgoust, Mrs. Gertrude T. Falgoust, the Paul Falgoust Trust, the Falgoust Educational Trust, Herman J. Falgoust, Preston L. Falgoust, and Roger J. Rousseau, the sums specified herein, plus any interest that accrued on sums deposited in the registry of the Court, in a check made payable to the defendants and directed to their counsel of record, Messrs. John J. Peytavin and Lloyd Himel, Martin, Himel, Peytavin and Nobile, P. O. Box 278, Lutcher, Louisiana, 70071.

New Orleans, Louisiana, this 5 day of March, 1981.

/s/Morey L. Sear
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
131.68 ACRES OF LAND, MORE OR LESS, SITUATED IN ST. JAMES PARISH, STATE OF LOUISIANA, et al.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
4.52 ACRES OF LAND, MORE OR LESS, SITUATED IN ST. JAMES PARISH, STATE OF LOUISIANA, et al.,
Defendants-Appellants.

No. 81-3280.

United States Court of Appeals,
Fifth Circuit.

Jan. 17, 1983.

Landowners and lessees of property taken by United States Government appealed from a judgment of the United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., asserting error in trial court's valuation of crop in place, in denying them a hearing before dispossessing, and in certain rulings upon matters of valuation of land in evidence. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) by awarding lessees their net profits for year of taking and costs they had already incurred for subsequent years' crops, district court used correct formula for measuring damages for loss of three-year sugar cane

crop, properly followed "undivided fee rule," and avoided double compensation which would have resulted from following lessees' proposal calling for adding compensation for loss of net profits from date of taking; (2) landowners and lessees were not entitled to a hearing before they were dispossessed of their land; and (3) steps District Court took in valuing land were not impermissible.

Affirmed.

1. Federal Courts Key 430

Louisiana law governs what is a property interest compensable under the Fifth Amendment with respect to a taking by the United States Government. U.S.C.A. Const. Amend. 5.

2. Eminent Domain Key 82

Under Louisiana law, growing crops are property compensable under the Fifth Amendment in a government taking. U.S.C.A. Const. Amend. 5.

3. Federal Courts Key 430

Measure of damages for a taking of property by United States Government is a matter of federal law.

4. Eminent Domain Key 122

Under federal law, guiding principle of just compensation for a taking of property is that owner must be made whole but is not entitled to more.

5. Eminent Domain Key 122

"Just" compensation for a government taking of property encompasses the public who pay for the taking as well as the individual property owner.

6. Eminent Domain Key 147

By awarding lessees their net profits for year of taking of their land by United States Government and costs they had already incurred for subsequent years' crops, district court used correct formula for measuring damages for loss of three-year sugar cane crop, properly followed "undivided fee rule," and avoided double compensation which would have resulted from following lessees' proposal calling for adding compensation for loss of net profits from date of taking.

7. Constitutional Law Key 281

Landowners and lessees of property taken by United States Government were not entitled by Fifth Amendment to a hearing before they were dispossessed of their land. U.S C.A. Const. Amend. 5.

8. Eminent Domain Key 198(1)

Landowners and lessees of property taken by United States Government were not entitled to a hearing by the Energy Policy and Conservation Act, which provided authority for taking, before they were dispossessed of their land. Energy Policy and Conservation Act, § § 2-552, 159(g), 42 U.S.C.A. § § 6201-6422, 6239(g).

9. Eminent Domain Key 198(1)

Landowners and lessees of property taken by United States Government were not afforded a right to a hearing by the Uniform Relocation Assistance and Real Property Acquisition Policies Act before they were dispossessed of their land. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, §§ 101-305, 102 (a, b), 301, 42 U.S.C.A. §§ 4601-4655, 4602(a, b), 4651.

10. Eminent Domain Key 131

Neither subsidiary findings of district court nor its determination of just compensation for land taken by United States Government, based upon a two percent upward adjustment in per acre price and a 40% upward adjustment for land's proximity to a common carrier oil pipeline adjacent to property in question, were clearly erroneous.

11. Eminent Domain Key 205

District court's $432 downward adjustment to per acre price of one of two comparable sales in determining just compensation for taking of land by United States Government was not impermissible, despite assertion that adjustment lacked supporting proof because Government's expert witness did not testify about it, where adjustment appeared in expert's written appraisal and written appraisal was admitted into evidence.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, GEE and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The transformation of the Cantrelle Reach of the Mississippi River from agriculture to industry has presented three issues for our decision including the age-old legal problem of how to measure damages for the destruction of crops. Appealing from a judgment in this land condemnation case the landowners and lessees argue that the trial court erred in its valuation of the crop in place, in denying them a hearing before dispossessing and in certain rulings upon matters of valuation of the land and evidence. Concluding that in the absence of controlling precedent the district court followed an economically sound approach to measuring crop damages, and that the additional attacks upon the judgment are without merit, we affirm.

In May 1978 the government filed a complaint under 40 U.S.C. § 258a for the taking, part in fee and part in perpetual easement, of 131.68 acres of land out of a 586-acre tract in St. James Parish near the Mississippi River. As required by 40 U.S.C. § 258a, the government deposited estimated compensation for the land. The government sought to use the land for the construction and operation of Strategic Petroleum Reserve facilities. On the same day that the complaint was filed, the district judge without a hearing granted the United States possession of the land. On July 30, 1979, the government filed a complaint to take an additional 4.52 acres for the same purposes from the same tract. The government deposited estimated compensation and on the following day was granted possession of the land. The cases were consolidated for trial.

Sugar Cane

Approximately 134 acres of the condemned land were under a crop lease for sugar cane. The lessees were planting and harvesting in a four-year rotation, so that at any given time one fourth of the land was in plant cane, one fourth in first year stubble, one fourth in second year stubble, and one fourth fallow.

Sugar cane has an unusual growing cycle, as described by the Louisiana Court of Appeals:

> Sugar cane is a crop that must be cultivated over a period of approximately fourteen months. It is planted in August or early September and is not harvested until the end of October, or in November and December of the following year. After harvesting, the crop reappears for two successive seasons (stubble cane) and is harvested in each of the two following years. Good farming practice allows three harvests (plant, first year stubble and second year stubble). In the fourth year, the land is allowed to be fallow, or is planted with peas or corn to enrich the soil for future plantings to come.

Michigan Wisconsin Pipe Line Co. v. Walet, 225 So.2d 76, 80 (La.Ct.App. 1969).

At trial, the government's expert witness testified that the lessees were entitled to the revenue they would have received from the 1978 crop, minus their 1978 harvesting costs, plus

two thirds of the cost of planting the acreage.[1] Making an assumption, favorable to the lessees, that all acreage was in the plant cane stage at the time of taking,[2] the government's expert concluded that $82,931 was a proper damage amount. The lessees' expert witness testified that three years' net profits had been taken, given the growing cycle of sugar cane. He calculated net profits for 1978 by subtracting harvesting costs from the revenue that the lessees would have received, and for 1979 and 1980 by subtracting "total production cost" from projected revenue. The lessees' expert concluded that just compensation for loss of crops required a damage award of $231,052.44.[3]

The district court adopted the government expert's approach. It reasoned that "compensating the defendants as if they had lost three years of sugar cane crops would impermissibly compensate them for loss of future profits" because the government had already paid the market value of the land. Accordingly, it entered a judgment ordering compensation

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[1] As to the approximately two acres of crops that were taken in 1979, the government's expert testified that the lessees were entitled to the revenue from the 1979 crop, minus their 1979 harvesting costs, plus two-thirds of planting costs.

[2] As noted, the testimony was that one fourth of the entire tract was in fallow at the time of the taking. The record does not reveal what percentage of the land actually taken was in fallow.

[3] This figure included net profits of $66,629.79 for 1978, $46,941.00 for 1979, and $117,481.65 for 1980. Sugar prices more than doubled between 1978 and 1980.

of $672,658.00 for the land, $1,048.00 for mineral subordination, and $82,931.00 for crop damages.

[1-5] Louisiana law here governs what is a property interest compensable under the Fifth Amendment. *United States v. 145.30 Acres of Land, Etc.*, 385 F.Supp. 699, 700-701 (W.D.La. 1974), aff'd *without opinion*, 524 F.2d 1231 (1975). Growing crops are property under Louisiana law. *Humble Pipe Line Co. v. Wm. T. Burton Industries, Inc.*, 253 La. 166, 217 So.2d 188, 191 (1968). State law, however, does not control the measure of damages. That is a matter of federal law. *Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1119 (5th Cir. 1980). Under federal law, the "guiding principle of just compensation . . . is that the owner 'must be made whole but is not entitled to more.' " *United States v. 564.54 Acres of Land, Etc.*, 441 U.S. 506, 516, 99 S.Ct. 1854, 1860, 60 L.Ed.2d 435 (1979) (quoting *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934). "Just" encompasses the public who pay for the taking as well as the individual property owner. *Id.* 441 U.S. at 512, 99 S.Ct. at 1858. Despite the open-ended definition of just compensation its inquiry is recompense for economic loss. The objective is to not displace the owner's *economic* position. That is, the government must, and need do no more than, put the owner in ". . . as good a position pecuniarily as if his property had not been taken." *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934).

[6] We believe that the district court used the correct formula for measuring damages for loss of the three-year sugar cane crop. The landowners received the difference in the market value of their tract of land before and after the

taking. That sum included compensation for lost opportunities to earn profits from the land after the taking. Adding compensation for the loss of net profits after the date of the taking would thus have resulted in double compensation.4/ If the lessees had received their net profits for 1979 and 1980, they would have been awarded in effect two years of profits from government land. See *King v. United States*, 504 F.2d 1138, 1142 (Ct.Cl. 1974). This common sense notion is expressed by the so-called "undivided fee rule," which provides that the division of a fee into separate interests cannot increase the amount of compensation that the condemnor has to pay for the taking of the fee. See *United States v. Buhler*, 305 F.2d 319, 331 (5th Cir. 1962) (ordering trial court on remand to consider whether total amount given to landowners and rice tenants exceeded fair market value of land taken). By awarding the lessees their net profits for the year of the taking and the costs they had already incurred for the subsequent years' crops, the district court properly followed the "undivided fee rule" and avoided double-counting.5/

Some federal courts have awarded as damages for the destruction of an immature crop its market value at maturity

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4/ Although the taking occurred in May 1978 and the harvesting of the 1978 crop did not occur until October, the district court properly rounded off in awarding the lessees their net profits from the 1978 growing season.

5/ No party below requested the district court to apportion the compensation between the landowners and the lessees. The land taken was not valued as a reversionary interest subject to a lease but as a fee interest. That is, the effect here is the same as if there were no lease. We review the case as tried.

minus costs of further cultivation, harvesting, and marketing. *United States v. 576.734 Acres of Land, Etc.*, 143 F.2d 408, 409-410 (3d Cir. 1944); *United States v. 729.773 Acres of Land, Etc.*, 531 F.Supp. 967, 974-975 (D.Haw. 1982) (adopting harvest value minus projected cultivation, harvesting and marketing costs as formula for measuring damages for loss of sugar cane crops). In *Daily v. United States*, 90 F.Supp. 699, 701 (Ct.Cl. 1950), the Court of Claims held:

> The most acceptable method for arriving at the value of a crop at the time of its destruction, assuming it had no market value at that time, is to first estimate the probable yield at harvest had the crop not been destroyed, then determine the market value of the crop at harvest and from that deduct the value and amount of labor and expenses which would have been necessary to continue the cultivation and marketing of the crop after its destruction.

In none of these cases, however, did the court expressly decide the question that confronts us here – whether net profits ought to be awarded for a crop that matures after the year of the taking. In *Daily*, for example, the court's concern was measuring damages for the destruction of a banana squash crop in July that would have been harvested that fall. *Id.*

In sum, we believe the district court properly awarded as damages the profits that would have been earned in the year of the taking plus the costs that had been incurred toward subsequent years.

Right to a Hearing

[7] The landowners and the lessees maintain that both the Congress and the Constitution secured their "right" to a hearing before they were dispossessed of their land. We disagree. The Fifth Amendment does not afford them such a right. "The question on which issue is joined is whether the government may exercise its eminent domain power consistently with the Fifth Amendment by physically seizing property without any prior notice, hearing, or compensation. The answer to this question is yes." *Stringer v. United States*, 471 F.2d 381, 383 (5th Cir.), *cert. den.*, 412 U.S. 943, 93 S.Ct. 2775, 37 L.Ed.2d 404 (1973).

[8] The landowners and the lessees also rely on the Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6422. This legislation provided the authority for the taking here, but not a right to a hearing. Section 6239(g) provides:

> Before any condemnation proceedings are instituted, an effort shall be made to acquire the property involved by negotiation, unless, the effort to acquire such property by negotiation would, in the judgment of the Secretary be futile or so time-consuming as to unreasonably delay the implementation of the Strategic Petroleum Reserve Plan, because of (1) reasonable doubt as to the identity of the owners, (2) the large number of persons with whom it would be necessary to negotiate, or (3) other reasons.

We need not decide whether § 6239(g) is hortatory, as urged by the government, or mandatory, as urged by the landowners and lessees. In any event, it does not furnish a right to a prior due process *hearing*.

[9] Nor does the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655, afford the landowners and the lessees a right to a hearing. The guidelines spelled out in § 4651 for acquisition of real property are only that. Section 4602(a) states that "[t]he provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation." Section 4602(b) adds, "Nothing in this chapter shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or damage not in existence immediately prior to [the effective date of the Act]." *See United States v. 320.0 Acres of Land, Etc.*, 605 F.2d 762, 822 n. 134 (5th Cir. 1979); *United States v. 410.69 Acres of Land, Etc.*, 608 F.2d 1073, 1074 n. 1 (5th Cir. 1979).

Valuation of the Land

The landowners also contend that the district court took several impermissible steps in valuing the land. First, they claim that one of the two comparable sales that the district court relied upon was not actually a sale but a mortgage. The government did attempt to introduce a mortgage document as evidence of the sale. The document was excluded on the landowners' objection, however, and the government's witness went on to testify that the sale of the property in question had in fact occurred, although it was accomplished by means of a stock transfer.

[10] Second, the landowners contend that the district court should have made a 10% rather than a 2% upward adjustment in the per acre prices derived from comparable

sales because of industrial leases on the tract.[6] In a related argument, they contend that a 50% rather than a 40% upward adjustment should have been made for proximity to CAPLINE, a common carrier oil pipeline that was adjacent to the landowners' property.

These challenges to the district court's calculation of damages raise issues of fact, not issues of law. The government's expert appraiser made no adjustment for the leases and only a 30% adjustment for CAPLINE. He testified that the just compensation for the taking of the land was $600,587.50, whereas the trial judge found that it was $672,658.00. "The weighing of the evidence in a condemnation proceeding is within the sole purview of the fact-finder, and it is not for this court to reweigh the evidence." *United States v. 6,162.78 Acres, Etc.*, 680 F.2d 396, 398 (5th Cir. 1982). Neither the subsidiary findings of the district court nor its determination of just compensation for the land were clearly erroneous.

[11] Third, the landowners object to the district court's $432 downward adjustment to the per acre price of one of the two comparable sales, claiming that this adjustment lacked supporting proof because the government's expert witness did not testify about it. It appeared in his written appraisal, however, and the written appraisal was admitted into evidence.

The judgment of the district court is AFFIRMED.

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[6] **The industrial leases were not on the part of the tract that was taken in fee and hence were not affected by the takings.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3280

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

131.68 ACRES OF LAND, ETC., ET AL.,
Defendants-Appellants.

* *

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

4.52 ACRES OF LAND, ETC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING
(February 14, 1983)

Before GOLDBERG, GEE and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/Patrick E. Higginbotham
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL
RULE 17 FOR STAY OF THE
MANDATE

U.S. COURT OF APPEALS
F I L E D

Feb. 14, 1983

Gilbert F. Ganucheau
Clerk

No. 82-1864

In the Supreme Court of the United States

OCTOBER TERM, 1983

131.68 ACRES OF LAND, MORE OR LESS SITUATED IN ST. JAMES PARISH, LOUISIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

JACQUES B. GELIN
MARTIN W. MATZEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioners were deprived of just compensation by the district court's use of the "before-and-after" method for computing compensation for a partial taking.

2. Whether the determination that petitioners' property constituted a single unit rather than two separate parcels for valuation purposes in condemnation proceedings is a determination of law subject to plenary review upon appeal, rather than a determination of fact subject to review under the "clearly erroneous" standard.

3. Whether cropowner petitioners are entitled to recover profits they might have earned upon future harvests of their perennial crop in the absence of a taking as the measure of just compensation, where that measure does not reflect the fair market value of the future crops on the date of taking.

4. Whether petitioners were entitled to a hearing on their objections to the taking before the district court granted the government possession of the property taken pursuant to the "quick take" provisions of the Declaration of Taking Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1864

131.68 ACRES OF LAND, MORE OR LESS SITUATED IN ST. JAMES PARISH, LOUISIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A16-A28) is reported at 695 F.2d 872. The district court's findings of fact and conclusions of law (Pet. A1-A13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1983. A petition for rehearing was denied on February 14, 1983 (Pet. App. A29). The petition for a writ of certiorari was filed on May 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of the judgment entered in two consolidated condemnation cases brought by the United States to acquire land for the construction and operation of an oil storage facility as part of the Strategic Petroleum

Reserve Program. The property at issue consists of approximately 586 acres fronting on the Mississippi River about 64 miles upriver from New Orleans (Pet. App. A3). At the time of the taking, the property was owned by Paul Nelson Falgoust and others (the "landowner petitioners"). Part of the property was leased to Herman J. Falgoust and others (the "cropowner petitioners") for growing of sugar cane. Major oil and pipeline companies had leased other parts of the property, which is in a "strategic and unique location" for the petroleum industry (Pet. App. A4). By declarations of taking filed together with complaints in condemnation and deposit into court of estimated just compensation, the United States accomplished a partial taking of the subject property in May 1978. The United States took only that portion of the subject property leased to the cropowner petitioners; the taking did not include that portion of the property leased for industrial purposes. See Pet. 3; Pet. App. A28 n.6.

After a non-jury trial, the district court determined the amount of compensation due for the partial taking of the subject tract and the taking of the sugar cane crop on the land taken (Pet. App. A1-A13). The aggregate amount of compensation awarded was $756,637 plus interest from the date of taking upon the deficiency in the estimated compensation deposited with the declaration of taking (Pet. App. A14). The court of appeals affirmed (Pet. App. A16-A28).

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. Petitioners appear to quarrel (Pet. 5-7) with the Fifth Circuit's view that the "before-and-after" method is the preferred approach to determination of just compensation

for a partial taking.[1] While the Fifth Circuit does appear to adhere to that view, see *United States* v. *8.41 Acres of Land, Orange County, Texas,* 680 F.2d 388, 392 (1982), no question concerning that issue is properly presented for review. The district court recognized that two alternative methods (see note 1, *supra*) have been used to compute compensation for a partial taking and stated that the "before-and-after" method is "the most appropriate method for use in this case" (Pet. App. A11). Petitioners did not challenge that determination in the court of appeals, and the court of appeals' opinion, not surprisingly, makes no mention of the issue. The question tendered for review accordingly is not properly presented to this Court. In any event, petitioners have not suggested any respect in which they were prejudiced by use of the "before-and-after" method.[2]

2. Petitioners list as a "Question Presented" (Pet. i) whether the determination that their property should be valued in condemnation as a single unit rather than two separate parcels is a determination of fact reversible only upon a showing of clear error. But the petition contains no argument supporting their assertion that another standard of review by the court of appeals was appropriate on this issue. Nor are any decisions of this Court, or any other court

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[1]Under the "before-and-after" method just compensation is computed as the difference between the value of the entire property before the taking and the value of the remainder left after the taking. Under an alternative approach just compensation is computed as the sum of the value of the portion of the tract taken and any severance damages to (*i.e.* diminution in value of) the remainder.

[2]Petitioners observe (Pet. 6) that "severance damage[s] [are] not at issue" in this case. It is accordingly difficult to see how the two methods of computation of just compensation for a partial taking could have produced divergent results. See note 1, *supra.*

cited in support of petitioners' contention that such review was required. Accordingly, there is no occasion for this Court to address the question presented by petitioners.

In any event, the decision of the court of appeals is clearly correct. Petitioners' effort to present the standard of review issue apparently was prompted by the court of appeals' statement that certain contentions advanced by petitioners upon appeal "raise issues of fact, not issues of law" (Pet. App. A28). The court of appeals' comment was directed at petitioners' contentions that upward numerical adjustments in the value per acre yielded by comparable sales employed in computing just compensation were insufficiently generous (see Pet. App. A27-A28; Petitioners' C.A. Br. 17-19). The court of appeals correctly observed (Pet. App. A28) that the propriety of these adjustments entails only weighing of evidence and accordingly is a question of fact.

As part of their argument that acreage values derived from comparable sales had been insufficiently adjusted, petitioners suggested that the district court "erred in failing to consider front land-back land characteristics of the subject property" (C.A. Br. 18). The court of appeals did not separately address this contention — treating it as part of petitioners' challenge to the district court's computation of just compensation. Petitioners did not contend that the district court had misapprehended the governing legal rule, but only that it had misapplied that rule to the facts of this case.[3] Although petitioners claimed that the district court should have valued their property as two separate tracts (treating "front lands" closer to the river and "rear lands"

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[3]Petitioners' brief recited (at 8): "[We] do not quarrel with the district court's methodology. [We] do submit, however, that the end product [of valuation] should have totaled the [amount of compensation testified to by petitioners' expert witness]."

further removed therefrom as separate tracts), they have never challenged the district court's findings (Pet. App. A4-A5) that parcels such as theirs are ordinarily sold as a unit, and that the highest and best use of the entire tract, both before and after the taking, is for industrial development of the kind dependent upon deep water access. In the circumstances, there was no occasion for the court of appeals to apply, much less announce, any novel principle of law in upholding as not clearly erroneous the district court's valuation of the subject tract as a unit. See *Sharp* v. *United States,* 191 U.S. 341, 354 (1903).

2. a. Cropowner petitioners contend (Pet. 7-15) that they were denied just compensation for the taking of their sugar cane crop. One element of the overall award of just compensation made by the district court was $82,931, representing compensation for the loss of the sugar cane crop (Pet. App. A8).[4] Sugar cane is a perennial plant with a three-year crop cycle; that is, one year's planting typically yields crops for three successive years before replanting is necessary. Accordingly, the district court awarded compensation for the taking of three years' crops. The amount awarded was computed as the sum of anticipated revenues from the 1978 crop less costs, plus two thirds of the cost of planting the acreage. Thus, the district court employed anticipated profits as the measure of value of the fall 1978 crop and employed cropowner petitioners' costs as the measure of value of the 1979 and 1980 crops (Pet. App. A8-A9, A21-A22).

Petitioners' threshold contention (Pet. 7) that the lower courts awarded them compensation only for one year's crop, ignoring the perennial nature of sugar cane, is

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[4]The overall award was not apportioned between the landowner and cropowner petitioners by the district court because the parties did not seek a judicial apportionment. Pet. App. A24 n.5.

obviously unfounded — for the award includes compensation for the 1979 and 1980 crops. Cropowner petitioners contend, however, that the only proper measure of just compensation is their projected profits over the entire three-year growing cycle of sugar cane. That contention is unfounded.

It is settled that just compensation requires only that the condemnee be put "in as good a position pecuniarily as if his property had not been taken." *Olson* v. *United States,* 292 U.S. 246, 255 (1934). But petitioners do and could not suggest that the fair market value at the date of taking in May 1978 of their future crops was equal to the profit they might have ultimately reaped had the crop cycle been uninterrupted by the taking. To assume that a " 'willing buyer would pay [that amount] in cash to a willing seller' " (*Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470, 474 (1973)) is to ignore both the time value of money, see *Jones & Laughlin Steel Corp.* v. *Pfeifer,* No. 82-131 (June 15, 1983), slip op. 12-13, and the inherent hazards of any agricultural enterprise. In short, to have awarded petitioners the profits they could ultimately have earned had their land not been taken would have put them in a far better position than they would actually have enjoyed had the taking not occurred.[5]

This disparity is not at all hypothetical in this case. As the court of appeals noted (Pet. App. A22 n.3), the price of sugar more than doubled between 1978 and 1980. Petitioners

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[5]Petitioners' reliance upon *W.H. Elliott & Sons Co.* v. *E.&F. King, & Co.,* 291 F.2d 79, 82 (1st Cir. 1961), is misplaced because that case involved damages for a continuing injury to perennial plants, rather than a one-time taking of such plants. The language quoted by petitioners (Pet. 13-14) does not necessarily entail the award of speculative future profits as an element of damage because the measure of damages prescribed is based upon the difference between the value of the uninjured and the injured plants.

seek an award based upon the profits they could have earned for their 1979 and 1980 crops based upon the prices prevailing in those years. But there is no reason to suppose that the price a buyer would have paid in May 1978 for these future crops would reflect the rapid price increase that followed that date. Petitioners offer no justification in law or economics for bestowing this windfall upon themselves. Moreover, they have not demonstrated, or even argued, that the award made by the district court for the value in 1978 of the 1979 and 1980 crops, based upon petitioners' planting costs, represents less than fair market value.[6]

b. Petitioners also contend (Pet. 11-13), that the court of appeals improperly treated their crops as a fixture, attached to the land, whereas Louisiana law treats unharvested crops as movable personalty. The court of appeals did no such thing. So far as we can discern, petitioners' misconception is based upon the court of appeals' comment (Pet. App. A23-A24; footnote omitted) that

> The landowners received the difference in the market value of their tract of land before and after the taking. That sum included compensation for lost opportunities to earn profits from the land after the taking.

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[6]Indeed, the district court's method was generous to petitioners in several respects. For instance, the entire expected profit on the October 1978 crop was treated as an element of damage even though the date of taking was May 1978 (Pet. App. A24 n.4). See also *id.* at A22 n.2.

Petitioners complain (Pet. 14) that planting costs were treated inconsistently — as an expense charged against revenues to determine profits in 1978, and as an index of future crop value with respect to the anticipated 1979 and 1980 crops. There is nothing irregular about this treatment. Projected 1978 revenues obviously had to be reduced by a share of planting costs lest petitioners receive a windfall for that year. At the same time, petitioners' investment in their future crops was a reasonable measure of the market value of those crops in 1978.

> Adding compensation for the loss of net profits after the date of the taking [to the crop taking award] would thus have resulted in double compensation.

By this the court of appeals plainly meant that future profits not reflected in the fair market value of future crops simply are not part of just compensation *for the sugar cane taking*, and that the *potential* of the *land* to earn future profits was fully reflected in the award of just compensation for its taking.[7] The status of growing crops under Louisiana law is irrelevant to the point made by the court of appeals.

4. Finally, petitioners argue (Pet. 15-16) that they were entitled to a hearing upon their contentions that the taking was not for a public use or was otherwise unlawful, prior to the grant of possession of the property to the United States under the "quick take" provisions of the Declaration of Taking Act, 40 U.S.C. 258a, that were employed in this case.[8] The court of appeals held (Pet. App. A26-A27) that neither the Fifth Amendment, nor either of the statutes upon which petitioners relied, requires such a hearing.

In the court of appeals petitioners relied upon 42 U.S.C. (Supp. V) 6239(g), which directs that efforts be made to acquire properties needed for the Strategic Petroleum Reserve through negotiation before resort to condemnation, and similar provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of

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[7]The cropowner's lease was apparently voidable at will by the landowner petitioners, and the land was accordingly valued as though it was a fee not subject to lease (Pet. App. A24 n.5; see page 5 note 4, *supra*).

[8]The Declaration of Taking Act provides that upon filing of a declaration of taking and deposit of estimated compensation with the court title to the lands covered by the declaration of taking immediately vests in the United States. The right to just compensation for the property —the deposit plus any deficiency determined to be due and interest thereon — vests in the former landowner.

1970, 42 U.S.C. 4651(1). Petitioners appear to have abandoned reliance upon the latter provision in this Court. In any event, as the court of appeals observed (Pet. App. A26-A27), neither statute in any way suggests that landowners are to be afforded pre-taking hearings.

Petitioners cite no authority for their due process claim. That claim is frivolous.[9] This Court has recognized the validity of the "quick take" procedure, and that title shifts to the government thereunder upon payment of estimated compensation into Court. *United States* v. *Dow*, 357 U.S. 17, 21-22 (1958). Indeed, the Court has recognized that the United States may take property by physical seizure "without authority of a court order," leaving the property owner to seek just compensation under the Tucker Act. *Id.* at 21. Plainly then, due process does not require that petitioners be afforded a pre-taking opportunity to forestall the taking. The property owner's interest are fully protected, from the moment of the taking, by the government's liability to pay just compensation. That obligation satisfies the Fifth Amendment because the sum ultimately paid "stands in place of the property and represents all interests in the property taken" (*Eagle Lake Improvement Co.* v. *United States*, 160 F.2d 182, 184 (5th Cir.), cert. denied, 332 U.S. 762 (1947)). See *United States* v. *Rodgers*, No. 81-1476

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[9]It is in any event doubtful that petitioners can claim any violation of due process, for they are unable to demonstrate prejudice — a necessary element of a due process claim. See *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 10. Petitioners' contentions that the taking was unlawful were heard and rejected by the district court during the course of the condemnation action (3 R. 328). Petitioners did not challenge that disposition on appeal and do not do so in this Court either, limiting their argument to the contention that the hearing on their objections to the taking should have been held sooner. Petitioners are thus in the anomalous position of insisting that additional process is due to protect "rights" that have been determined not to exist. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

(May 31, 1983), slip op. 18-19, 24-25. Just as the United States' deposit of estimated just compensation and liability for any deficiency, with interest (see page 8 note 8, *supra*), satisfies the Fifth Amendment if the taking is valid, the United States' liability to pay the landowner just compensation for its "temporary use and occupation," *United States* v. *Dow, supra,* 357 U.S. at 26, satisfies both the Just Compensation and Due Process Clauses in the unlikely event that the taking were ultimately held invalid on grounds like those raised in the district court by petitioners.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

JACQUES B. GELIN
MARTIN W. MATZEN
Attorneys

JULY 1983

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[10]Although the validity of a taking is subject to judicial review, the scope of that review is quite narrow. *Catlin* v. *United States,* 324 U.S. 229, 240-243 (1945); *Berman* v. *Parker,* 348 U.S. 26, 33-36 (1954). See generally, *United States* v. *162.20 Acres of Land in Clay County, Mississippi,* 639 F.2d 299, 303-304 (5th Cir.), cert. denied, 454 U.S. 828 (1981). We are unaware of any reported case in which a taking by the United States has been held invalid on grounds like those presented by petitioners.

DOJ-1983-07